Supreme Court, U.S.
FILED
DEC 6 - 2006
OFFICE OF THE CLERK

No. 06-318

In the Supreme Court of the United States

CATALINA ALTAMIRANO HERNANDEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Immigration and Nationality Act attaches a variety of consequences to an alien's conviction for an "aggravated felony." That Act defines "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)"—which, in turn, defines the phrase to mean "any felony punishable under the Controlled Substances Act" (18 U.S.C. 924(c)(2))— "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The questions presented are:

1. Whether petitioner's conviction for possessing heroin with the intent to sell it, which is a felony under both state and federal law, qualifies as an "aggravated felony" under the Immigration and Nationality Act.

2. Whether expungement of petitioner's conviction under state law affects its categorization as an "aggravated felony" under federal law.

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OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is reprinted in 176 Fed. Appx. 896. The order of the Board of Immigration Appeals (Pet. App. 4a-5a) and the decision and order of the immigration judge (Pet. App. 6a-10a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2006. On July 7, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 4, 2006, and the petition was filed on August 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is convicted of committing an "aggravated felony" within the meaning of that Act, 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). Conviction of an aggravated felony also limits the potential forms of relief from removal that are available to the alien.

The INA defines an "aggravated felony" by reference to a list of twenty-one categories of criminal offenses. Any offense "described in" that definition, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). That definition of "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Title 18 classifies a federal crime as a "felony" if "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559 (2000 & Supp. IV 2004).

2. Petitioner is a native and citizen of Mexico who entered the United States without being admitted or paroled. Pet. App. 2a, 6a. In December 1985, she was convicted in California state court of possessing five grams of heroin with the intent to sell it, which is a fel-

ony under state law that is punishable by up to four years of imprisonment. *Id.* at 16a-20a; Cal. Health & Safety Code § 11351 (West 1991 & Supp. 2006). She was sentenced to 270 days in jail, but that sentence was suspended and she was placed on probation for three years. Pet. App. 33a. Her conviction subsequently was expunged under state law. *Id.* at 2a.

The Immigration and Naturalization Service commenced removal proceedings against petitioner. Pet. App. 6a.[1] Petitioner conceded removability but sought relief from removal. *Id.* at 7a. The immigration judge ordered petitioner removed to Mexico. *Id.* at 6a-10a. The immigration judge found that petitioner was not eligible for relief from removal because her state-law drug conviction was an aggravated felony. *Id.* at 9a. In addition, the immigration judge held that the later expungement of petitioner's conviction did not render her eligible for relief because it was not a conviction for "simple possession." *Id.* at 8a-9a.

The Board of Immigration Appeals affirmed. Pet. App. 4a-5a. The Board held that petitioner's conviction was an aggravated felony because it "clearly requires the state to prove possession or purchase with an intent to sell." *Id.* at 5a. The Board also held that petitioner was not entitled to relief as a first offender because her conviction was not for simple possession. *Id.* at 4a.

3. The court of appeals affirmed in a brief, unpublished memorandum order. Pet. App. 1a-3a. The court agreed that petitioner's conviction for possession of heroin with the intent to sell was an aggravated felony be-

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

cause it is "punishable as a felony under federal law," as well as state law. *Id.* at 2a. The court also held that expungement did not render petitioner eligible for relief from removal because a conviction expunged under state law "remains a conviction for purposes of federal law," and because her conviction was not for simple possession and therefore would not preserve her eligibility for relief under federal law. *Id.* at 2a-3a.

ARGUMENT

1. Petitioner seeks (Pet. 7-10) this Court's review of the court of appeals' determination that her conviction for possessing heroin with the intent to sell it is an aggravated felony. Petitioner relies (*ibid.*) on a circuit conflict on the question whether a controlled substance offense that is a felony under state law and that is punishable under the Controlled Substances Act, albeit generally only as a misdemeanor, is a "drug trafficking crime" within the meaning of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(B). On December 5, 2006, this Court held, in *Lopez* v. *Gonzales*, No. 05-547, that state-law felonies that would be punished as a misdemeanor under federal law are not "drug trafficking crimes" under the INA. That decision, however, is of no help to petitioner for two reasons.

First, because petitioner intended to sell the heroin that she possessed, her crime was an aggravated felony under the first clause of 8 U.S.C. 1101(a)(43)(B), as it involved "illicit trafficking in a controlled substance." See *Lopez*, slip op. at 4-5. Whether the crime was also a "drug trafficking crime" under 18 U.S.C. 924(c) is thus of no independent significance in this case.

Second, petitioner's crime—possessing heroin with the intent to sell it—is a felony under both federal and

state law. See 21 U.S.C. 841(a)(1) and (b)(1)(A)(i); 18 U.S.C. 3559(a); Pet. App. 2a, 18a. Her offense thus qualifies as a "drug trafficking crime" as this Court interpreted that phrase in *Lopez*. Slip op. at 12.[2]

2. Petitioner's argument (Pet. 13-20) that her offense is not an aggravated felony because it was expunged does not merit further review. Petitioner identifies no circuit conflict on that question. Moreover, petitioner's contention that a state-law expungement controls the federal immigration consequences of a conviction is wrong. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111-112 (1983) (holding, under 18 U.S.C. 922, that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); see *id.* at 113, 115 (where a federal statute requires only that the offense be "punishable" as a felony, "expunction under state law does not alter the historical fact of the conviction") (emphasis omitted).

Equally unavailing is petitioner's contention (Pet. 16-17) that her conviction does not qualify as an aggravated felony because of the Federal First Offender Act, 18 U.S.C. 3607. Putting aside the debatable proposition

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[2] Petitioner's argument (Pet. 10-13) that the court's decision conflicts with another Ninth Circuit decision, *United States* v. *Rivera-Sanchez*, 247 F.3d 905 (2001), is both wrong and beside the point. It is wrong because *Rivera-Sanchez* involved a different California law that criminalized drug offenses, some of which lacked any federal parallel. See Pet. App. 5a. It is also beside the point because this Court does not generally grant review to address intra-circuit conflicts, particularly when one of the allegedly conflicting decisions (the one in this case) is unpublished and thus non-precedential within the circuit.

that the Act governs the treatment of *state-law* offenses under the INA, petitioner would not qualify for relief by the plain terms of the statute, which extend only to persons found guilty of simple possession under 21 U.S.C. 844. Petitioner was not convicted of simple possession. Pet. App. 4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

DECEMBER 2006